(2)

No. 93-632

DEC 17 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ANTARES AIRCRAFT, L.P.,

Petitioner,

vs.

FEDERAL REPUBLIC OF NIGERIA and NIGERIAN AIRPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where plaintiff alleges that the Nigerian Airports Authority converted plaintiff's aircraft by temporarily preventing its removal from Nigeria until charges for landing, parking and refueling were paid, where all such charges were paid in Nigerian currency to the Nigerian Authorities in Nigeria, and where all of the allegedly wrongful conduct took place in Nigeria, are the facts that the plaintiff is an American partnership and the money paid originated from a United States bank account, by themselves, sufficient to confer subject matter jurisdiction under section 1605(a)(2) of the Foreign Sovereign Immunities Act.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Federal Republic of Nigeria ("Nigeria") and Nigerian Airports Authority ("NAA") respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by Antares Aircraft, L.P. ("Antares").

STATEMENT OF THE CASE

This action for conversion arises out of the temporary detention of a DC-8 airplane (the "Airplane") by the NAA for non-payment of landing and parking fees and fuel charges incurred at the Lagos, Nigeria airport. When the Airplane landed at the Lagos Airport and began accruing the charges that led to the detention, it was registered in Nigeria and was both owned and operated by Expert Air, a Nigerian company. Antares' interest in the Airplane was as mortgagee. After the Airplane had been on the ground accruing charges at the Lagos airport for more than two months, Antares re-acquired legal possession of the Airplane and sought to fly it out of Nigeria. By that time, several thousand dollars of unpaid charges had accrued.

The NAA refused to allow the Airplane to depart until all accrued and outstanding charges had been paid. Antares hired counsel in Nigeria and sent an additional representative to Nigeria to secure the release of the Airplane. All negotiations in this matter occurred in Nigeria over a period of several months ending in May 1989. Antares agreed to make, and made, a series of payments in Nigeria to the Nigerian authorities in Nigerian currency, in return for which the NAA released the Airplane. All of the payments were received in Nigeria. In May 1989, Antares hired a Canadian flight crew, flew the crew to Nigeria and had the crew fly the Airplane to Canada.

Antares claims in its Petition that NAA "directed" that a portion of the funds be transferred to a specific bank account in the United States. However, there is no support for that

statement in the record. An affidavit submitted by Antares in the district court stated that funds were transferred from Antares' New York bank account to a California bank account designated by NAA as a "proper depository," but an exhibit attached to that affidavit revealed that this transfer was to a California account belonging to Antares' own lawyer. Consistent with this evidence, the district court found that "it has not been established that the NAA either demanded to be paid in the U.S. or actually obtained funds in the U.S." (Opinion by Judge Martin, Petitioner's Appendix at F6.)

In October 1989, Antares brought the instant action in the Southern District of New York alleging a conversion of the Airplane. Antares asserted subject matter jurisdiction under section 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(2), based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . ." 28 U.S.C. §1605(a)(2).

The district court held that the defendant's commercial acts did not cause "a direct effect in the United States," and that the FSIA does not confer jurisdiction of this matter on the United States courts. The United States Court of Appeals for the Second Circuit affirmed. *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991) ("*Antares I*"). On June 29, 1992, this Court granted certiorari, vacated the decision below, and remanded the case to the Second Circuit for further consideration in light of *Republic of Argentina v. Weltover* ("*Weltover*"), ____ U.S. _____, 112 S. Ct. 2160 (1992). __ U.S. __, 112 S. Ct. 3020 (1992). Upon remand the Second Circuit

once again affirmed the decision of the district court. 999 F.2d 33 (2d Cir. 1993) ("*Antares II*").

SUMMARY OF ARGUMENT

The Second Circuit decided in *Antares II* that the temporary detention in Nigeria of Antares' airplane by NAA, until charges for landing, parking and refueling were paid, did not cause a direct effect in the United States within the meaning of section 1605(a)(2) of the FSIA. Certiorari should be denied because the Second Circuit's decision is correct, it is wholly consistent with this Court's decision in *Weltover*, it does not conflict with the decision of any other Circuit Court, and it does not raise any issue of sufficient importance to warrant review by this Court.

The facts of the case compelled the result reached by the Second Circuit; it would have been remarkable if the Second Circuit had reached any decision other than the one it did. The temporary detention of the Airplane occurred in Nigeria; the landing, parking and refueling fees at issue were incurred in Nigeria by an aircraft which was registered in Nigeria and was operated and flown into Nigeria by a Nigerian company; all communications between the parties took place in Nigeria; the parties reached an agreement as to charges in Nigeria; and the payment of the charges was received by the NAA in Nigeria in Nigerian currency. The only connections with the United States were that Antares is an American partnership and that the charges were paid from Antares' New York bank account.

Antares argues that the FSIA confers jurisdiction on the courts of the United States in every case in which an American business claims that it has been harmed during commercial dealings with a foreign sovereign, even if, as in the case at bar, those dealings have no connection with the United States. However, there is no support for that argument in the language of the FSIA, and, as the Second Circuit below properly noted, such an interpretation "would in large part eviscerate the FSIA's provision of immunity for foreign states." *Antares II*, 999 F.2d at 36.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED. THE SECOND CIRCUIT DECISION IS BASED UPON COMPELLING FACTS, IS WHOLLY CONSISTENT WITH THE SUPREME COURT'S *WELTOVER* DECISION AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Antares seeks damages allegedly caused when the NAA temporarily detained its Airplane in Nigeria for nonpayment of landing, parking, and refueling charges incurred by the Airplane in Nigeria. In *Antares II*, the Second Circuit affirmed the dismissal of the Complaint for lack of subject matter jurisdiction and properly held that defendant's conduct did not cause a direct effect in the United States within the meaning of section 1605(a)(2) of the FSIA.

The Second Circuit applied the Supreme Court's instruction in *Weltover* that a "direct effect" under the FSIA is one that follows as an immediate consequence of the defendants' acts and held that there was not a direct effect in the United States. While the Second Circuit recognized that a foreign tort can have "sufficient contacts with the United States to establish the requisite 'direct effect'" under section 1605(a)(2), it held that the case at bar was not such a case. 999 F.2d at 37. The Second Circuit stated:

> However, in the instant matter, all legally significant acts took place in Nigeria. The aircraft was registered in Nigeria. There is no evidence that the use of the aircraft was related to substantial commerce with the United States. The detention of, and physical damage to, the plane happened in Nigeria. The alleged conversion thus occurred in Nigeria. Moreover, the negotiations over, and payment of, the outstanding fees occurred in Nigeria and utilized Nigerian currency.
>
> That the money came from a bank account in New York is a fact, but one without legal significance to the alleged tort . . . . Wherever the source of the money, payment had to be in Nigeria, just as payment in *Weltover* had to be in New York. The tort thus began in

> Nigeria with the detention of the aircraft and ended in Nigeria with the payment of money. Unlike Weltover, where the parties had agreed that performance was to occur in New York, the sole act connected to the United States in the instant matter, the drawing of a check on a bank in New York, was entirely fortuitous and entirely unrelated to the liability of the appellees.

Id.

Boiled down to its essence, Antares' complaint is that the Second Circuit rejected its argument that the FSIA confers jurisdiction in every case in which an American business claims injury as a result of commercial dealings with a foreign sovereign. But the Second Circuit's rejection of Antares' argument was clearly correct. The Second Circuit recognized that Antares' reading of the FSIA would in this and other cases "result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff." *Id.*

There is no suggestion in the language of the FSIA, in the Supreme Court's decision in *Weltover*, or in any of the Circuit Court decisions cited by Antares that Congress intended to create jurisdiction in every case in which the plaintiff is an American business. If Congress had wished to, it could easily have expressly provided for such jurisdiction, but Congress did not. Instead, Congress required that the foreign sovereign's conduct cause a direct effect in the United States. The Second Circuit, therefore, was clearly correct to "find it difficult . . . to

read into this otherwise somewhat restrictive legislation [the FSIA]" such "an all-encompassing jurisdiction." 999 F.2d at 37.

A. Antares Has Mischaracterized This Court's *Weltover* Decision In An Attempt To Create A Conflict

Antares has mischaracterized this Court's decision in *Weltover* in an attempt to create the misimpression that a conflict exists between that decision and the Second Circuit's decision in *Antares II*. Antares claims that the Second Circuit decision conflicts with a holding by this Court in *Weltover* that "a 'direct effect' of harm to a business is incurred where that business is located." (Petition at pp. 11-12.) However, contrary to Antares' assertion, this Court's *Weltover* decision did not contain any such holding. There is *dicta* in the Second Circuit's *Weltover* decision that "a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *aff'd sub nom. Republic of Argentina v. Weltover, Inc.*, __ U.S. __, 112 S.Ct. 2160 (1992). However, that statement was not the basis for the Second Circuit's *Weltover* decision, and, more importantly, the statement was neither considered nor referred to in any way by this Court in *Weltover*.

Weltover was a suit against the Republic of Argentina for breach of contractual obligations under bonds. This Court held that a "direct effect" under section 1605(a)(2) of the FSIA is one that follows as an immediate consequence of the defendant's activity and that Argentina's alleged breach of the bonds had a direct effect in the United States because "New York [was] . . .

the place of performance for Argentina's ultimate contractual obligations. . . ." 112 S.Ct at 2168.

Weltover involved foreign plaintiffs, and, therefore, the issue presented by Antares in the case at bar -- whether injury to an American plaintiff is sufficient, by itself, to constitute a direct effect in the United States within the meaning of the FSIA -- was neither presented by the case nor decided by this Court.

B. There Is No Conflict Among The Circuits

Antares has also argued that there is a conflict between the Second Circuit's decision in *Antares II* and the decisions of other Circuits. Once again, however, Antares has mischaracterized the relevant decisions. None of them conflicts with the decision of the Second Circuit in the case at bar.

Antares claims a conflict with only one Circuit Court decision which came after the Supreme Court's decision in *Weltover*. That case is *Walter Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992), and the facts of that case are clearly distinguishable from those presented in the case at bar. The plaintiff in *Walter Fuller*, an American corporation, brought a breach of contract action against the defendant foreign sovereign, which had sold plaintiff an airplane. The contract of sale obligated the defendant to defend plaintiff in any legal action in which plaintiff's title to the airplane was

challenged, but defendant refused to defend plaintiff when its title was challenged in a lawsuit in the United States District Court for the Eastern District of Arkansas. *Id.* at 1387.

The Fifth Circuit held that the defendant's breach caused a direct effect in the United States within the meaning of section 1605(a)2 of the FSIA, and the basis for jurisdiction was the very same as the basis for jurisdiction cited by the Supreme Court in *Weltover*. As in *Weltover*, the place of performance of defendant's contractual obligation was in the United States -- at the United States District Court in Arkansas -- and, therefore, defendant's failure to perform that obligation had a direct effect in the United States. Although the plaintiff in *Walter Fuller* was an American corporation, that was not the basis for jurisdiction, and, therefore, there was no conflict between the decision in *Walter Fuller* and the decision of the Second Circuit in this case.[1]

The remaining circuit cases cited by Antares are *Gould v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988); *Transamerican Steamship Corp. v. Somali Democratic Republic S.A.*, 767 F.2d 998 (D.C. Cir. 1985); *Callejo v. Bancomer*, S.A., 764 F.2d 1101 (5th Cir. 1985); and *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982).

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[1] Antares also cites two post-*Weltover* district court opinions as being in conflict with *Antares II*. (Petition at 19.) Even if these cases did present a conflict -- which they do not -- a conflict between a circuit court decision and district court decision is not a basis for this Court to grant certiorari. Supreme Court Rule 10. Such conflicts are properly resolved by the circuits.

None of these decisions conflict with the Second Circuit decision below. Contrary to Antares' assertion, none of them holds that an American business automatically suffers a direct effect in the United States whenever it is injured as a result of commercial dealings with a foreign sovereign. In each case, jurisdiction was based upon additional contacts between defendant's conduct and the United States.

In addition, there is a much more important reason why these cases do not provide a sufficient predicate for Supreme Court review of the Second Circuit decision. All of these cases were decided before this Court's *Weltover* decision, when all of the courts interpreted the direct effect clause in a manner which was subsequently rejected by this Court in *Weltover*. Before this Court's *Weltover* decision, the formula applied by the Second Circuit for determining whether there was a direct effect in the United States was whether the defendant's conduct was sufficiently direct and sufficiently in the United States that Congress would have wanted an American Court to hear the case. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The District of Columbia Circuit held in *Transamerican*, 767 F.2d at 1004, that a direct effect under section 1605(a)(2) is one that is substantial and foreseeable. And the other courts used both formulations. *See, e.g., Callejo*, 764 F.2d at 1111; *Gould*, 853 F.2d at 453; and *Harris*, 691 F.2d at 1351.

In *Weltover*, this Court indicated that neither formula was the appropriate standard for interpreting the FSIA. Instead, this Court held that a direct effect is one which flows as an immediate consequence of the defendant's acts. It is unreasonable to assume that the circuits will not follow *Weltover* or that they will cling to interpretations of the FSIA which have been rejected in *Weltover*. It is also unreasonable to assume in advance that the circuits will interpret *Weltover* in ways which conflict with each other. Accordingly, the conflict which Antares alleges to have existed before *Weltover* is no longer relevant. Clearly, this Court's intervention is not needed to resolve an alleged conflict created by legal standards which this Court has already rejected and which presumably will no longer be followed.[2]

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[2] Even though the several circuits applied different standards before *Weltover*, the result reached by the Second Circuit in *Antares II* is consistent with the results reached by every other circuit that has considered cases in which an American citizen or American company has either traveled abroad or placed tangible assets into foreign commerce and then suffered injury outside of the United States. All of these circuit courts have held that the financial loss suffered in the United States by American plaintiffs as a result of such injuries does not satisfy the direct effect requirement of section 1605(a)(2) of the FSIA. Accordingly, the courts have dismissed such cases for lack of subject matter jurisdiction unless, unlike the case at bar, there were other substantial contacts with the United States. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Upton v. Empire of Iran*, 459 F.Supp. 264, (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

CONCLUSION

Certiorari is inappropriate in this case. The Second Circuit's decision below is clearly the correct decision under the compelling facts of this case. It is wholly consistent with the decision of this Court in *Weltover*, and does not conflict with the decisions of any other circuit. Defendants' conduct had no connection with the United States and clearly did not cause a direct effect in the United States within the meaning of the FSIA. The position urged by Antares -- that the FSIA confers jurisdiction in all cases in which an American business claims injury as a result of commercial relations with a foreign sovereign, even if those dealings have no connection with the United States -- is not supported by either the statute or the cases. Therefore, it is neither surprising nor legally significant beyond the confines of this case that Antares' position was rejected by the Second Circuit below. Antares' proffered interpretation of the FSIA would expand jurisdiction under the FSIA beyond reason. Foreign sovereigns should be subject to the jurisdiction of American courts only when their commercial activities have a direct effect in the United States and not simply because they had commercial dealings outside the United States with an American plaintiff.

For the foregoing reasons, respondents Federal Republic of Nigeria and Nigerian Airports Authority respectfully request that the Petition for a Writ of Certiorari be denied.

Dated: December 17, 1993

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